No. 92-1479

In The

Supreme Court of the United States

October Term, 1993

McDERMOTT, INC.,

Petitioner,

vs.

AmCLYDE, A DIVISION OF AMCA INTERNATIONAL, INC. and RIVER DON CASTINGS, LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Should the injured plaintiff in a maritime case who settled with three of five defendants be doubly penalized and defendants who forced the matter to trial be doubly rewarded by the Court of Appeals' deduction of *both* the full dollar amount of the settlement *and* the settling defendants' proportionate share of liability from plaintiff's judgment?

LIST OF PARTIES

Parties to the proceedings below were the petitioner McDermott, Inc., the respondents AmClyde, a division of AMCA International, Inc. (formerly "Clyde Iron"), River Don Casting, Ltd., and defendants British Ropes, Ltd., International Southwest Slings, Inc., and Hendrik Veder, B.V.

RULE 29.1 LIST

The parent corporation of McDermott Incorporated is McDermott International, Inc.

Subsidiaries, Affiliates and Partnerships of McDermott International, Inc. (Excluding Wholly-Owned Subsidiaries)

Davy McDermott, Ltd.
Initec, Astano Y McDermott International Inc., S.A.
Malmac Sdn. Bhd.
McDermott Arabia Company, Ltd.
McDermott-ETPM, Inc.
P.T. McDermott Indonesia
McDermott Incorporated
B&W Mexicana, S.A. de C.V.
Babcock & Wilcox Beijing Company, Ltd.
Diamond Power Hubei Company, Ltd.
Babcock & Wilcox Gama Kazan Teknolojisi Anonim Sirketi
Thermax Babcock & Wilcox Private, Ltd.
Hudson Northern Industries, Inc.
Rotovent S.A. de C.V.
Diamond Power (Australia) Pty., Limited

RULE 29.1 LIST – Continued

Halley & Mellowes Pty., Ltd.
Heerema-McDermott (Aust.) Pty., Ltd.
HeereMac
Panama Offshore Chartering Company, Inc.
McDermott (Nigeria), Limited
McDermott Scotland, Limited
MMC – McDermott Engineering Sdn. Berhad
P.T. Babcock & Wilcox Indonesia
P.T. Bataves Fabrications
Topside Contractors of Newfoundland, Ltd.
Arabian Petroleum Marine Construction Company
DB/McDermott Company
Abahsain Hudson Heat Transfer Co., Ltd.
Construcciones Maritimas Mexicanas, S.A. de C.V.
ASEA Babcock PFBC
B&W Fuel Company
B&W Nuclear Service Company
Babcock-Ultrapower Jonesboro
Babcock-Ultrapower West Enfield
Diamond Power Specialty, Limited
Espacialidades Termomecanicas S.A. de C.V.
Babcock & Wilcox Services, Inc.
KBW Gasification Systems, Inc.
North American CWF Partnership
Palm Beach Energy Associates
Maine Power Services
PowerSafety International, Inc.
South Point CWF

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 979 F.2d 1068 (5th Cir. 1992), and is reprinted in the Appendix to the Petition herein at p. A-1. The denial of petitioner's request for rehearing en banc, also treated by the Court of Appeals as a request for panel rehearing, is reported at 985 F.2d 555 (5th Cir. 1993) and reprinted in the Appendix to the Petition herein at p. A-32. The verdict, memoranda decisions, and judgments of the United States District Court for the Southern District of Texas (Houston Division) (U.S. Magistrate Judge

George A. Kelt, Jr.) are not reported. They are reprinted in the Appendix to the Petition herein at p. A-33.

JURISDICTION

Petitioner invoked federal jurisdiction under 28 U.S.C. §§ 1332 and 1333, bringing suit in the U.S. District Court for the Southern District of Texas, Houston Division. A jury trial was held 13 November – 17 December 1990. At the outset of trial, a "sixty-day order of dismissal" was entered on plaintiff's settlement of all claims against defendants, British Ropes, Ltd., International Southwest Slings, Inc., and Hendrik Veder, B.V. (hereinafter referred to as "sling defendants").

After trial, the court took the case under advisement and considered briefing on the non-settling defendants', AmClyde and River Don Casting, Ltd.'s (hereinafter jointly referred to as "hook defendants") Motion for Credit for the sling defendants' settlement. The court duly denied the hook defendants' motion for a *"Hernandez"*[1] credit and entered judgment on the verdict, 17 January 1991. McDermott and the hook defendants each sought relief from adverse aspects of the judgment under Federal Rules of Civil Procedure 50 and 59, which was denied and a "Superseding Final Judgment" entered 14 March 1991.

Petitioner and Respondents filed timely Notices of Appeal and prosecuted their appeal and cross-appeal to

[1] *Hernandez v. M/V RAJAAN*, 841 F.2d 582 (5th Cir. 1988), *cert. denied*, 488 U.S. 981 (1989).

the Court of Appeals for the Fifth Circuit. On 11 December 1992, the panel opinion of the Court of Appeals was filed. Petitioner applied for rehearing en banc, which, along with panel rehearing, was denied, 25 January 1993.

The jurisdiction of this Court to review the judgment of the Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. § 1254(1). McDermott, Inc.'s Petition for a Writ of Certiorari was filed 12 March 1993 and a Writ of Certiorari was granted by this Court on 28 June 1993.

STATUTES INVOLVED

All statutes involved are referenced in the "Jurisdiction" section, *supra*.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

McDermott, Inc. filed a complaint with jury demand on 18 July 1988 in the United States District Court, Southern District of Texas, Houston Division. Named defendants and served were River Don Castings, Ltd., Clyde Iron, a Division of AMCA International (later known as AmClyde), International Southwest Slings, Inc. (hereinafter, "ISSI"), and British Ropes, Ltd. The complaint was amended to add defendant Hendrik Veder B.V., 3 May 1989, and Clyde Iron filed its cross-claim for contribution and indemnity against River Don Castings, Ltd., 4 May 1989. Each defendant answered, defending in part on grounds that someone other than themselves or plaintiff

was responsible for plaintiff's damages (Southern District of Texas Record Doc. Nos. 6, pp. 2214-15; 7, p. 2197; 10, p. 2181; 11, p. 2174; 18, p. 2020).

AmClyde filed a motion for partial summary judgment, seeking dismissal of McDermott's tort/products liability claims against it on 25 September 1989. AmClyde then filed a third party complaint against Hudson Engineering, Inc., a sister company of McDermott, Inc., and a counter-claim against McDermott for the cost of AmClyde's warranty replacement of the Shearleg crane's defective, broken main hook, 19 October 1989 (S.D. Tex. Record Document Nos. 35 and 36). AmClyde's Motion for Partial Summary Judgment was denied on 28 December 1989.

On 28 August 1990, pursuant to the parties' consent, the case was referred to Magistrate Judge Kelt to conduct all further proceedings, through trial and entry of final judgment.

AmClyde, in a coordinated effort by defendants, moved for reconsideration of its previously denied Motion for Partial Summary Judgment, while the "sling defendants," British Ropes, ISSI, and Hendrik Veder also filed a Motion for Partial Summary Judgment, all on 14 September 1990. Said motions were duly opposed by McDermott and plaintiff countered with its own Motion for Partial Summary Judgment against AmClyde on 17 October 1990. There is no express ruling on these motions in the record, though convening trial indicated their denial. Plaintiff and the three "sling defendants" reached a settlement, the day before trial, of McDermott's claims against them, for damage to both the SNAPPER deck and

the Shearleg crane, in exchange for one million dollars, to be paid within sixty days (Joint Appendix, p. 26 and Petition Appendix pp. A-59-65.)

Trial began 13 November 1990. That morning, defendants AmClyde and River Don announced that they had entered into a settlement whereby they would join their defense under one counsel, that previously of AmClyde, alone. Hook defendants claimed the settlement terms were confidential and said settlement was filed under seal. AmClyde also reurged the substance of its previously denied Motions for Partial Summary Judgment in a Motion in Limine, as well as arguments that the SNAPPER deck was not "other property," seeking entry of judgment relieving AmClyde of all liability. The court, in part, granted summary judgment on AmClyde's motion, and extended it to River Don, denying McDermott any recovery against them, whether in tort or contract/warranty, for damages to the Shearleg crane (sometimes hereinafter, "crane damages"). Record excerpts reflecting the trial court's ruling, amounting to a partial summary judgment, are included in the Petition Appendix, p. A-40. McDermott stipulated, by virtue of its settlement with the sling defendants, that it accepted responsibility for any damages which the jury found were caused by the sling's failure (Joint Appendix pp. 27-31, 33-35, 40 and 42). AmClyde abandoned its cross-claim. The trial went forward to the jury, therefore, solely on the issues of liability and damages to the SNAPPER deck (sometimes hereinafter "deck damages") and AmClyde's counter claim for the cost of replacing the defective hook.

McDermott objected to and sought reconsideration of the trial court's preclusion of its case for damages to the

Shearleg crane under both tort and contract prongs of *East River*[2]. Upon denial of reconsideration, at the outset of trial, 14 November 1990, and at the close of its case, 6 December 1990, McDermott proffered the evidence of its Shearleg crane damages (Petition Appendix pp. A-41-43 and A-49-50). A summary, per Federal Rules of Evidence Rule 1006, of these damages, proffered for the trial record, is reproduced in the Petition Appendix with the summary of deck damages actually admitted in evidence at pp. A-66 and 67.

The jury returned its verdict, 7 December 1990, finding AmClyde 32% liable, River Don, 38% liable, and "McDermott/Sling defendants" 30% liable for the accident (Petition Appendix, p. A-37). The jury apportioned causation rather than fault, primarily due to the combination of warranty, tort, and strict liability theories presented. No liability was attributed to Hudson Engineering on AmClyde's third party demand and the jury found against AmClyde and in favor of McDermott, denying AmClyde's counter-claim for the cost of the replacement hook (Petition Appendix p. A-37 and 39). The jury found McDermott's damages, to the SNAPPER deck alone, were $2,100,000.00 (Petition Appendix p. A-38).

The trial court withheld judgment to consider the hook defendants' request for credit from the plaintiff's settlement with the sling defendants. The trial court duly denied the hook defendants' motion for a "dollar for

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[2] *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 865 (1986).

dollar" credit from the sling defendants' settlement, finding that McDermott had not received full compensation due to preclusion of recovery for its "crane damages" (Petition Appendix pp. A-51-53). Judgment was entered on the verdict in accordance with the jury's allocation of liability by causation: $672,000 against AmClyde, $798,000 against River Don, and deducting $630,000 reflecting the combined contribution to the accident of McDermott, Inc. and the "sling defendants;" and awarded McDermott its costs as prevailing party (Petition Appendix pp. A-54-56).

Plaintiff and Defendants filed timely motions for new trial, judgment notwithstanding the verdict, and/or to alter or amend the judgment. Defendants' Motion for judgment N.O.V. and for new trial was denied 13 March 1991. Plaintiff's Motion for Post-Judgment Relief was denied 14 March 1991 and final judgment entered (Petition Appendix p. A-58). McDermott and hook defendants filed timely notices of appeal to the Court of Appeals for the Fifth Circuit.

The hook defendants, designated appellants/cross-appellees in the Fifth Circuit and McDermott, as appellee/cross-appellant duly prosecuted their appeals. The Fifth Circuit rendered an opinion 8 December 1992 which was withdrawn for recalculation of the judgment with "settlement credit"[3] and replaced by the opinion of 11

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[3] The Court of Appeals had deducted the $1 million settlement credit, then the proportionate reductions, 30% for McDermott/Sling defendants and 32% for AmClyde (implicitly rejecting joint and several liability), yielding a judgment against River Don of $418,000.

December 1992 (Petition Appendix pp. A-1-32). McDermott prevailed on appeal in that it was awarded a money judgment, albeit reduced to $470,000.00, against River Don. McDermott's verdict and judgment against AmClyde were summarily vacated, denying all recovery under tort or contract theories. The Fifth Circuit also refused to notice a box-full of proffered evidence in the record of McDermott's Shearleg crane damages, and denied McDermott its right to present this evidence to a jury in a warranty action against River Don. McDermott timely petitioned the Fifth Circuit for rehearing en banc.

The Fifth Circuit, treating McDermott's petition for rehearing en banc as one for panel rehearing and rehearing en banc, denied both by Order dated 25 January 1993 (Petition Appendix p. A-33-34). McDermott submitted its Petition for a Writ of Certiorari to review the Fifth Circuit's ruling herein within ninety days from filing of the Court of Appeals' decision and same was marked "received" by the Clerk of the Supreme Court, 12 March 1993. This Honorable Court granted a writ of certiorari herein, limited to the first issue presented by the petition, on 28 June 1993 (Joint Appendix p. 43).

B. STATEMENT OF FACTS

McDermott, Inc. was supplied a marine heavy lift crane with a warranted capacity of 5000 short tons, plus ten percent impact load by Clyde Iron (now "AmClyde") at a cost of approximately $7 million. The crane's main hook was obtained by AmClyde from River Don Castings, Ltd. The crane's self-stowing design led to its nomination as the "Shearleg." On 10 October 1986, the

Shearleg crane, mounted aboard McDermott's preexisting barge, the Intermac 600 (hereinafter "I600"), was attempting its first offshore lift: an approximately 4100 short ton oil and gas production platform called the "SNAPPER deck", which McDermott had built and was to install for its client on a structural steel base, known as a "jacket", affixed to the floor of the Gulf of Mexico, off the Texas coast, East Breaks block 165. Shortly after the Shearleg crane lifted the SNAPPER deck from its transport barge, one huge prong of the Shearleg's main hook broke off and plummeted down into the top of the SNAPPER deck. An eleven inch diameter, steel cable-laid sling, supplied by British Ropes through ISSI, then immediately unraveled at its "eye-splice," dropping half the 4100 ton deck down onto its separate transport barge and causing it to sway, striking the boom of the Shearleg crane. The shock of these sudden, massive load shifts wrought havoc with the stability of the I600, the SNAPPER deck's transport barge, and the integrity of the crane's heavily loaded cable reeving. Over one hundred people, including an AmClyde representative, were either near or aboard the I600 at the time of this incident, many of whom were in easy striking distance of snapping steel cables or collapsing steel components. Most of the I600's passengers ran away from the working end of the crane boom. At least one person was injured in the rush. Fortunately, McDermott's crane operator suppressed panic and immediately began to lower the part of the SNAPPER deck still dangling from the remains of the hook, thus relieving the tension on the crane and averting further disaster.

The Shearleg crane and SNAPPER deck were towed back to McDermott's fabrication facilities for repairs.

McDermott was obligated to deliver the SNAPPER deck, installed and fully operational on a tight schedule. Therefore, McDermott had to contract with its primary competitor to lift and set the SNAPPER deck at a cost, for the lifting services alone, of approximately $300,000.00. McDermott accomplished the repairs to the SNAPPER deck, set it on location, and delivered it to its client.

The Shearleg crane, however, required extensive repairs. *Inter alia*, the main hook had to be replaced; damaged steel cable reeving had to be replaced; sections of the crane boom had to be repaired or replaced, all due to damage received when the hook broke on 10 October 1986. Another offshore deck installation required the Shearleg crane on 8 December 1986. McDermott completed its repairs by that time, but had to adapt the crane's block to use another hook, as AmClyde had not yet provided a replacement for the broken one.

On 10 October, McDermott advised AmClyde and British Ropes of their products' failures, and on 13 October 1986 made a call in warranty against AmClyde. Shortly thereafter, McDermott and AmClyde agreed to send the failed hook to Packer Engineering for metallurgical and mechanical tests and analysis, in an effort to determine the cause of its failure. Packer's tests and analysis indicated that the hook did not meet required specifications and, particularly, found substantial cast-in flaws on the fracture surface that were involved in the failure of the hook. This information, combined with eyewitness observations, corroborating evidence gleaned from analysis of the structural damage to the deck, and the position of the broken prong when it imbedded in the SNAPPER deck, all showed that the hook was defective

and that its failure, more probably than not, precipitated the accident of 10 October 1986. AmClyde obtained a contrary analysis, laying blame on the cable-laid sling's failure and blaming the sling's failure on an alleged "unwinding" effect produced by linking Hendrik Veder's "left hand" and British Ropes' "right hand" cable-laid slings together end-to-end.

AmClyde denied McDermott's warranty claim for the replacement hook and repairs, claiming that the hook did not cause the accident, although the contract warranty provision called for free replacement of "defective" parts regardless of whether they caused an accident. McDermott, acting under close schedule constraints for the Shearleg crane in its offshore construction projects, reserved its rights and issued purchase orders, as demanded by AmClyde, to obtain a new hook and AmClyde's services to repair the crane. A replacement hook was finally delivered and installed just before the Shearleg began a tow to West African offshore construction sites, 28 May 1987. AmClyde, for its part, at all times maintained charges against McDermott for the replacement hook, regardless of its defects, because it blamed the cable laid sling failure for the 10 October 1986 accident. The present action ensued.

SUMMARY OF ARGUMENT

The Court of Appeals' grant to the hook defendants of a dollar for dollar credit of McDermott's settlement with the "sling defendants," against judgment liability,

despite the determination of the "sling defendants' " liability at trial, demonstrates how needless deviation from fundamental legal principles creates fundamental injustice. The Court of Appeals, in the present case, as in its preceding *Hernandez* decision, blindly followed what appeared to be a bright-line rule without critical consideration of the limited legislative context of its genesis (i.e. the Longshoreman's and Harborworker's Compensation Act[4]), its legal basis or lack thereof in principles of contribution, joint and several or solidary liabilities of joint tort-feasors, set-off, privity of contract, and comparative liability in maritime law. The lower court's opinion loosely interchanges "offset" (Petition Appendix pp. A-25, 28), "set-off" (Petition Appendix pp. A-25, 27) and "credit" (Petition Appendix pp. A-25-29); but mentions no legal basis for its use of these terms. The result is actually double enforcement of a presumed, unproven contribution right in favor of hook defendants – first, *pro rata* or proportionately against McDermott, Inc.'s money judgment, then *pro tanto*, against the sling defendants' settlement, though neither contribution nor any of the other legal principles implicated are discussed. The question not asked by the Court of Appeals and unanswered by the hook defendants is: by what right do hook defendants claim any benefit from a private settlement agreement to which they were not parties?

The Court of Appeals' *pro tanto* credit for settlement functions much like a set-off; but a set-off is:

> A counter demand which defendant held against plaintiff, arising out of a transaction

[4] 33 U.S.C. § 901 *et seq.*

> extrinsic to plaintiff's cause of action. . . . Only a counter demand upon which defendant at commencement of the action might have maintained independent suit [against plaintiff].

Black's Law Dictionary 1538 (Rev. 4th Ed.). River Don urged no such counter demand against any party herein, nor was there any extrinsic transaction between River Don and plaintiff which could have given rise to such a demand. AmClyde, the other "hook defendant," lost at trial on its counter-claim for the price of the replacement hook. The hook defendants did not and cannot claim a "set-off" of the settlement against their liability in tort. Nor is the enforced contribution by McDermott/sling defendants to satisfaction of the hook defendants' liability a "credit". "Credit" is " . . . the deduction of a payment made by a debtor from an amount due. . . . " from the debtor. The American Heritage Dictionary (2nd College Ed. 1982). Neither McDermott nor the sling defendants were shown to be indebted to the hook defendants; rather, the contrary is true.

In fact, what the Court of Appeals did, was to grant the hook defendants dollar for dollar contribution from the sling defendants through their settlement payment, on top of proportionate contribution per the jury's apportionment of 30% causation to the sling failure, attributed to "McDermott/Sling defendants" by the jury. This double contribution was given the hook defendants automatically, with no showing of any entitlement to contribution and without consideration of the lack of commonality between the sling defendants' settled liability for Shearleg crane damages and the hook defendants' liability for the damages to the SNAPPER deck alone – despite the

trial court's express recognition of this fatal defect in the hook defendants' claim for some credit for the settlement.

Contribution requires, at the outset, an identity of, or "joint" liability for the same damages between the parties. The burden to establish a right to contribution lies with the party claiming it. *Boyett v. Keene Corp.*, 815 F.Supp. 204, 208-210 (E.D. Tex. 1993) and cases cited therein. Hook defendants demonstrated no identity of liability and damages between them and the sling defendants for the crane damages to which the settlement is, at least in part, attributable. Hook defendants cannot do so without admitting joint liability for the crane damages.

Even as to deck damages, the sling defendants' liability in settlement was not "joint" with the hook defendants' adjudicated liability in tort. Hook defendants would have to establish themselves third-party beneficiaries to the settlement agreement to benefit therefrom. The settlement terms do not admit of any construction favoring the hook defendants; therefore, they could not establish third party beneficiary status. The only joint liability between the sling defendants and hook defendants arises from McDermott's acceptance of liability on the part of the "sling defendants," upon which the jury allocated damages through comparative causation. If, as the Fifth Circuit opined, this allocation of liability is meaningless *vis a vis* the sling defendants, then there is no basis for any joint liability between hook and sling defendants. Thus, no right to any contribution is established. On the other hand, if the 30% aggregation of McDermott's and the sling defendants' objective parts in causing the accident is accepted and the hook defendants'

judgment liability reduced thereby, any claim for contribution is extinguished. Contribution must, on this record, be *pro rata*, not *pro tanto*. There is simply no legal basis for hook defendants to claim a dollar for dollar "credit," "set-off," or "contribution" from McDermott's settlement with the "sling defendants."

Nor should a party who opts to go to trial be forced in the exercise of that right to risk a greatly disproportionate share of responsibility for damages due to a settlement with other defendants. In the present case these concerns were alleviated by McDermott's acceptance of responsibility, on its own and the sling defendants' behalf, for the sling's failure, leaving only apportionment of causation among objective actors in the casualty for the jury. Thus, the sling defendants' absence from trial prevented neither plaintiff nor the hook defendants from properly prosecuting their sides of the case.[5] McDermott had contended from the outset that the defective hook was the primary cause of the accident, while the hook defendants' primary contention was that McDermott's rigging arrangement of the slings was the precipitating cause. Thus, the parties at trial were able to fully litigate the comparative contributions of the various actors to the deck damage sustained by McDermott. The jury's apportionment of 30% causation to "McDermott/sling defendants," while exonerating Hudson Engineering, the

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[5] One upper-level employee of a sling defendant, Hendrik Veder, Herman Alberts, testified as an expert witness on behalf of the hook defendants, offering his opinion that the accident was primarily the result of the "right to left" cable laid sling unwinding phenomenon. Trial Transcript Vol. 19, November 29, 1990, Doc. No. 346, R.O.A. Vol. 30, pp. 2010-11.

designer of the sling arrangement, amply demonstrates that the parties and the jury gave careful consideration to evidence of the slings' role in the accident. Thus, hook defendants received their contribution from the settling defendants and plaintiff as they should have, *via* comparative liability. With justice done, nothing more was required with regard to the deck damages or McDermott's settlement with the sling defendants. The Fifth Circuit's decision took "well enough" and by not leaving it alone, produced utter injustice which, it is prayed, this Court should reverse.

The hook defendants are anticipated to argue, as did the Fifth Circuit panel opinion, that McDermott's settlement with the sling defendants must be confiscated and converted to the hook defendants' use to prevent McDermott's receiving a "windfall" or "double-recovery"; and that McDermott's acceptance of liability for the sling's failure should be disregarded. These arguments must lead this Honorable Court to disregard a great deal more to succeed.

In this case, as a matter of fact and as determined by the trial court, the settlement was no windfall or double recovery to McDermott. McDermott was denied recovery of damages to its Shearleg crane entirely as against the hook defendants, but such damages were plainly recoverable from the sling defendants and were slightly more than half the total dollar amount of McDermott's claims. Moreover, as the trial court also noted, there was no independent finding of liability against McDermott nor was Hudson Engineering, the McDermott subsidiary that designed the failed sling arrangement, held liable at all. See Petition Appendix pp. A-37 and 52. The clear import

of these aspects of the verdict is that, had the sling defendants gone to trial, McDermott could have been exonerated of all fault with regard to the sling failure and one or all of the sling defendants would have been found liable for both deck and crane damages. Hook defendants would remain liable for at least 70% of the damage to the SNAPPER deck section, but the sling defendants would have had no one to share liability for the crane damages with.[6] McDermott's proffered evidence of Shearleg crane damages well shows that, even if reduced to the same extent as were its deck claims[7], the $1 million settlement did not over-compensate McDermott in any regard.

ARGUMENT

A panel of the Court of Appeals for the Fifth Circuit took up for review a case adjudicated upon a jury verdict apportioning liability for $2.1 million in damage to McDermott's SNAPPER deck – 30% to the combined interests of McDermott, Inc., British Ropes, Ltd., International Southwest Slings, Inc., and Hendrik Veder, B.V. (hereinafter collectively, McDermott/sling defendants) and 70% to AmClyde (32%) and River Don Castings, Ltd. (38%) (hereinafter collectively, hook defendants). Yet

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[6] This is true only *vis a vis* McDermott. *East River* would have imposed no blockade to proportionate contribution for all damages as between the hook and sling defendants, had they all gone to trial.

[7] The same percentage reduction yields $2,439,454.80 as an approximation of what plaintiff's crane damages award would have been.

remarkably, the Court of Appeals' panel opinion, without any finding of trial error in respect of damages or apportionment of causation between hook defendants[8] and "McDermott/sling defendants,"[9] and without examining the sling defendants' settlement terms, reversed and rendered its own judgment, redistributing liability for the damages – 78% to McDermott/Sling defendants and 22% to the 70% culpable hook defendants. In the process, the court below also took from McDermott 100% of the partial recovery it had made of its Shearleg crane damages *via* pre-trial settlement with the sling defendants. This incredible calculus was achieved by reducing McDermott's judgment against hook defendants by *both* the sling defendants' 30% proportionate liability *and* by a *pro tanto* credit for their entire settlement of deck, crane, and litigation liabilities with McDermott.

The court below based its raid against McDermott's judgment and settlement upon *Hernandez v. M/V RAJAAN*, 841 F.2d 582 (5th Cir. 1988), which, itself, is wholly based upon the Eleventh Circuit's interim version of a *pro tanto* "credit for settlement" rule enunciated in *Self v. Great Lakes Dredge & Dry Dock Co.*, 832 F.2d 1540

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[8] The Court of Appeals held that AmClyde was insulated from liability to McDermott, as a matter of law, by its contract with McDermott.

[9] " . . . the settling [sling] defendants, . . . where at the most thirty (30%) percent responsible for the accident (no separate contributory negligence, if any, finding was made as to McDermott). . . . " Trial Court Ruling on Motion for *Hernandez* Credit, Petition Appendix p. A-52.

(11th Cir. 1987), *cert. denied* 486 U.S. 1033 (1988).[10] Analysis of the legal underpinnings of *Hernandez* and *Self* reveals that the *pro tanto* credit for settlement should not, on its own principles, apply in the present case because the sling defendants' proportionate share of liability for the damages was properly determined and McDermott was not overcompensated in any way.

Moreover, the *pro tanto* rule is fundamentally unsound. Even in cases, like *Hernandez*, where a settling tort feasor's proportionate liability is not expressly tried, submitted to the fact-finder, and found, the *pro tanto* credit rule is unjustified and should be scrapped. This throw-back to "moiety"[11] or "no contribution"[12] rules, laid to rest by *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) and comparative apportionment of liability,[13] should likewise be committed to the deep.

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[10] *Self* was modified on subsequent appeal after remand, *Great Lakes Dredge & Dry Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 484 (1993), to open the door to unbridled contribution between settling and non-settling defendants.

[11] Aptly characterized by Judge Learned Hand as a "vestigial relic" of maritime law. *Oriental Trading & Transport Co. v. Gulf Oil Corp.*, 337 U.S. 919, 69 S.Ct. 1162, 93 L.Ed. 1728 (1949).

[12] Contribution, even by moiety, was disallowed at common law prior to the development of comparative negligence. cf. *The MAX MORRIS v. Curry*, 137 U.S. 1 (1890); *The ALABAMA & The GAMECOCK*, 92 U.S. 695 (1876).

[13] Owen & Moore, *Comparative Negligence in Maritime Personal Injury Cases*, 43 La.L.Rev. 941, 954 n.9 (1983).

I. THE *SELF\HERNANDEZ* "DOLLAR FOR DOLLAR SETTLEMENT CREDIT" IS NOT APPLICABLE

A. McDERMOTT RECEIVED NO WINDFALL OR DOUBLE RECOVERY

The trial court clearly held that *Hernandez* did not apply in this case because McDermott's inability to recover its Shearleg crane damages from anyone other than the sling defendants, whether by trial or settlement, prevented any violation of even *Hernandez*'s version of the "one satisfaction rule" (Petition Appendix pp. A-51-53). Moreover, in *Self* as in *Hernandez*, the dollar for dollar credit was an extraordinary remedy, applied to a perceived difficulty in accounting for an "absent" defendant's share of liability so that "present" or "non-settling" defendants would not be unjustly cast in judgment with a settling defendant's share of liability. The chorus to this chanty admonishes that the fault of a party not represented before the court cannot be tried. See, e.g., *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716, 718-720 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983). This "problem", while over-inflated in *Ebanks*, *Self*, and *Hernandez*, is left for later deflation herein, because it did not arise in the present case.

B. LIABILITIES, INCLUDING THAT OF SETTLING PARTIES, COMPARATIVELY APPORTIONED

McDermott, pursuant to its settlement, admitted and accepted liability for all damage caused by the sling defendants' involvement in this matter. The jury was

repeatedly so instructed. (JA pp. 26-28, 31-32, 38 and 40; Petition Appendix p. A-37). There was, therefore, no need for the jury or court to determine the sling defendants' subjective fault. Further, the apportionment of liability for damages was by the objective measure of causation, not fault, as the Fifth Circuit affirmed (Petition Appendix pp. A-31-32). Since no settling tort-feasor's state of mind or culpability was at issue, but only the physics of the objects involved, the presence or absence of a represented party behind any given object could have no proper impact upon apportionment of responsibility for the accident and damages.[14]

The *Hernandez* Court of Appeals was faced with a record apparently devoid of any effort to determine the settling defendants' proportionate share of liability. While the burden to establish a claim of right, like contribution, should rest with the party asserting it,[15] Dianella, the non-settling defendant in *Hernandez*, obtained a dollar for dollar contribution or credit for the settling defendants' $410,000.00 settlement with no proof of entitlement. The basis of the Court of Appeals' *Hernandez* decision, it is suggested, was more the sense of injustice engendered by the settling tort feasors' small settlement, Machiavellian involvement in the trial to Dianella's prejudice,[16] and the

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[14] Liability – in warranty, tort, or products liability – of course, had to be and was established as to the hook defendants. See, Petition Appendix pp. A-35-38.

[15] *Boyett v. Keene Corp.*, 815 F.Supp. at 209 and cases cited therein.

[16] "The third-party defendants settled with Hernandez . . . then participated in the trial to establish Dianella's negligence." *Hernandez*, 841 F.2d at 591.

resultant large judgment, rather than the opinion's two-paragraph kowtow to *Self* 's version of the "one satisfaction rule." *Hernandez* at 591. McDermott obtained no special favors from the sling defendants by the settlement. The jury was advised of the fact of the settlement, not amount, so that neither the sling defendants' absence as individual parties nor the potential interest or bias of any witness affiliated with the settling defendants would be a subject of speculation and no party would be prejudiced. Indeed, Herbert K. Alberts, a twenty year employee of Hendrik Veder, B.V., one of the settling sling defendants, testified as the hook defendants' expert on rigging, wire rope, and cable-laid slings. Trial Transcript Vols. 19-20, November 29, 1990, Doc. Nos. 346-347, R.O.A. Vols. 30-31.

On the contrary, in the present case, the mechanism and impact of the cable-laid slings' failure in the accident were fully litigated. The question whether failure of the hook or slings precipitated the accident was the very crux of the liability case at trial, as the hook defendants' counsel argued in closing (JA p. 35). The hook defendants' primary liability defense was that an "unwinding" phenomenon occurred in the slings due to inherent features of the slings' design and McDermott's arrangement of the slings in use, overloading and breaking the hook. McDermott's case posited that the hook broke first, due to manufacturing defects and misrepresentations about the hook's capacity, over-loading and failing the cable laid slings. McDermott also acknowledged that " . . . the failure of the slings at a load less than its rated minimum breaking strength is a cause of damage to the deck and crane . . . ", as the jury was repeatedly instructed at the

hook defendants' request.[17] Thus, unlike *Hernandez*, the extent of the settling sling defendants' involvement in causing the accident, as well as the plaintiff's part, was affirmatively litigated between McDermott and the hook defendants without collusion or realignment between plaintiff and the settling defendants.

Hook defendants, indeed all defendants, had answered McDermott's suit with, *inter alia*, boiler-plate defenses of plaintiff's contributory negligence and third party liability.[18] However, the hook defendants only cross-claimed against each other, counter-claimed against McDermott, Inc., and third party claimed against McDermott "sister" companies, e.g., Hudson Engineering, Inc. The hook defendants chose not to cross-claim against the sling defendants, perhaps to maintain solidarity among the defendants, while developing a defense almost entirely predicated on the theory that the failure of the sling caused the accident. The focus of the hook defendants' attack did not change after the sling defendants' settlement – at trial they still elected to defend in large part by seeking to attribute as much causation as they could to the sling failure, regardless of whether caused by

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[17] This is the only instruction sent into the jury room *via* Jury Interrogatory No. 5 (Petition Appendix p. A-37). This was at least the *sixth* reiteration of this stipulation or instruction. See, e.g, JA-28-29, JA-33, JA-34, JA-37-38, JA-39-40 and 42. It is submitted that the hook defendants, thusly, got as much mileage out of the settling defendants as they were entitled to and perhaps more.

[18] ISSI, Doc. No. 6, pp. 2214-15; British Ropes, Doc. 7, p. 2192; Clyde Iron, Doc. No. 10, p. 2181; River Don, Doc. No. 11, p. 2174; Hendrik Veder, Doc. No. 18, p. 2020.

McDermott's alleged misuse or the sling defendants' failure to warn.

Given the hook defendants' election to litigate on the basis of proportionate allocation of liability and the trial court's instructions to the jury thereon, hook defendants' invocation of the *Hernandez pro tanto* credit for settlement rule smacks of "double-dipping". The *Hernandez* or *Self* dollar for dollar rule, confected for cases in which the settling tort-feasors' proportionate liability cannot be or is not determined, cannot be justly applied in the present case, where the settling tort-feasors' share of responsibility could be and was candidly tried, found, and adjudged, 30% ($630,000.00) to the benefit of the hook defendants. See *Self*, at 1547. cf. *Edmonds*, 443 U.S. at 270-271, 99 S.Ct. at 2761-2762.

C. THE STATUTORY AND POLICY MANDATES ESSENTIAL TO THE REASONING OF *EDMONDS* AND *HERNANDEZ* ARE NOT PRESENT HERE

The present action is a property damage case; no injured longshoremen, seamen, nor any statutorily immune tort-feasors are involved. *Hernandez*, *Self* and their foundation, *Edmonds*, were longshoremen's cases involving *sui generis* concerns under the regime of immunities and liabilities mandated by the Longshoremen's and Harborworker's Compensation Act, 33 U.S.C. § 901 *et seq*. The rule of *Edmonds* and its erstwhile prodigies, *Self*, *Hernandez* and the decision below, loses its reason when the LHWCA's absolute liability for compensation benefits

and immunization from tort liability of plaintiff's stevedore employer are not present. The Eighth Circuit Court of Appeals so held, after searching analysis of law and policy on both sides of the question:

> "In *Edmonds*, the negligent party not present at trial (the longshoreman's employer) avoided tort liability by paying statutorily required benefits, rather than settling the longshoreman's claim. Thus, *Edmonds* does not involve the public policy considerations at issue in this case, such as the need to deter collusive settlements without deterring legitimate ones."

Associated Elec. Co-Op v. Mid America Transportation Co., 931 F.2d 1266, 1270-71 (8th Cir. 1991). *Edmonds*, itself, made this clear:

> "Though we recently acknowledged the sound arguments supporting division of damages between parties before the court on the basis of their comparative fault, see *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed. 251 (1975), [n.30] we are mindful that here we deal with an interface of statutory and judgemade law. In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change.

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 271-72, 99 S.Ct. 2753, 2762 (1979). The Court elaborated its intended distinction between LHWCA cases and other maritime cases in note 30:

> " . . . [T]he general rule is that a person whose negligence is a substantial factor in the plaintiff's indivisible injury is entirely liable even if

other factors concurred in causing the injury. Normally the chosen tortfeasor may seek contribution from another concurrent tortfeasor. If both are already before the court – for example, when the plaintiff himself is the concurrent tortfeasor or when the two tortfeasors are suing each other as in a collision case like *Reliable Transfer* – a separate contribution action is unnecessary, and damages are simply allocated accordingly. But the stevedore is not a party and cannot be made a party here, so the *Reliable Transfer* contribution shortcut is inapplicable. Contribution remedies the unjust enrichment of the concurrent tortfeasor, see Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U.Pa.L.Rev. 130, 136 (1932), and while it may sometimes limit the ultimate loss of the tortfeasors chosen by the plaintiff, it does not justify allocating more of the loss to the innocent employee [plaintiff], who was not unjustly enriched. . . . "

Id., at 271 n. 30.

McDermott, like virtually all settling plaintiffs, as part of the consideration for its settlement with the sling defendants was obligated to defend, indemnify and hold them harmless against any claim for contribution (Petition Appendix, pp. A-62-63). Thus, whether assumed voluntarily, as at the trial below, or compelled in a separate contribution action, McDermott would ultimately bear the sling defendants' proportionate share of liability. The "*Reliable Transfer* contribution shortcut" *was applicable* in this case and was properly and efficiently executed by the parties and the court at trial. The Court of Appeals' award to the hook defendants of a second round of contribution – dollar-for-dollar, rather than proportionate

– directly produced the "unjust enrichment of the concurrent tortfeasor" and "allocated more of the loss to the innocent" plaintiff, which this Court identified as the very evils to be remedied by proportionate contribution and joint and several liability among co-tortfeasors. *Edmonds*, at 271 n. 30. *Hernandez*'s interpretation of *Edmonds*' rule, therefore, is not applicable to this case, and moreso, it should clearly not be applied as an *additional* reduction in the injured plaintiff's recovery.[19] Indeed, if the rule of *Edmonds* is strictly applied in this case, accepting *arguendo* the analogy, necessary to *Self*, between the stevedore's payment of compensation and payments received in settlement, exactly the opposite result obtains – McDermott suffers no reduction in its recovery against the hook defendants; neither proportionate to the sling defendants' liability, nor dollar for dollar.

II. THE *PRO TANTO* CREDIT FOR SETTLEMENT RULE IS SIMPLY A BAD IDEA

A. NOT DOLLAR FOR DOLLAR BUT APPLES FOR ORANGES

The foregoing analysis of the "*pro tanto* credit for settlement rule" applied to the case subjudice, amply demonstrates the fundamental flaws in this seductive but

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[19] In *Edmonds*, the Court required trial defendants to pay 100% of the plaintiff's damages *regardless* of the stevedore's comparative liability or benefits paid. Clearly, *Edmonds*' affirmation of joint and several liability sinks, rather than supports *Self*, *Hernandez*, and the opinion below.

unjust regime. Foremost among these is the impossible equation of settlement dollars with judgment dollars in computation of "one satisfaction". As the Fifth Circuit said in *Leger v. Drilling Well Control*, 592 F.2d 1246, 1250 (5th Cir. 1979):

> "Leger merely obtained a favorable settlement. By releasing DWC and Continental in exchange for $182,331.05, Leger 'sold' or relinquished any claims which he had against them. See *Rose v. Associated Anesthesiologists*, 163 U.S.App. D.C. 246, 501 F.2d 806 (1974) (characterizing a settlement as a *pro rata* sale of the plaintiff's claim). At the time of the settlement negotiations, no one knew how a jury would apportion fault or in what amount it would find damages."

Furthermore,

> " . . . [S]ettlement Dollars cannot be equated with dollars obtained in the trial process. Any amounts received in settlement are discounted both by plaintiff and defendant to take into account the risks and rewards of going to trial. . . .
>
> "It is clear that the condition *vel non* of double recovery depends upon whether one totals the absolute dollar figures of recovery and matches the total against the total damages [found at trial] or whether one totals the percentages of fault and sees that the total does not exceed [or fall short of] 100%."

Id., at 1250 n. 10. Accord, *Associated Elec. Co-Op v. Mid America Transportation Co.*, 931 F.2d at 1271.

Parties buy peace, avoid litigation burdens and expenses, avoid actual proof of and findings of liability,

avoid publicity and resolve the risks of trial, all by offer and acceptance of a mutually agreeable, determinate sum. Judgment dollars, on the other hand, carry with them all of the above-mentioned transaction costs, notably here, the costs of delay and litigation even after judgment. In *Franklin v. Kay Pro Corp.*, 884 F.2d 1222 (9th Cir. 1989), *cert. denied*, 11 S.Ct. 232 (1993), the court noted:

> " . . . [T]he very dynamics of settlement guarantee that, even with a good faith hearing, the offset scheme forces non-settling defendants to pay more than the amount for which they are culpable. Settlement is attractive to parties because it reduces litigation costs. Therefore, plaintiffs are willing to settle for less than they might receive, if a claim were fully litigated [note 16 quoted below, citation omitted]. Courts are instructed to allow this discounting when determining whether a partial settlement was entered in good faith. . . . [citations omitted]"
>
> "[note 16] . . . 'Settlements are desirable not just because trials are costly . . . but because settlements allow parties to "manage their own disputes" and avoid the uncertainties and limitations of the winner-take-all, imposed decisions that courts make in fully litigated cases. Settlement also offers privacy to litigants and enables them to consider opportunities for resolutions that would not be available in a trial judgment.' D. Provine, *Settlement Strategies for Federal District Judges*, 1-2 (1986)."

McDermott's settlement with the sling defendants in the present case demonstrates several of these factors, including the substantial trial-cost savings to the court and parties of removing three defendants and "netting out"

the costly and complex conflict between McDermott's potential contributory liability for misuse of the cable laid slings *versus* the sling defendants' failure to warn of or to remedy the dangers inherent in cable laid slings with opposite "lay" directions, by simply assuming full responsibility for the proportion of damage to the SNAPPER deck caused by the slings' failure at trial. Though much to McDermott's chagrin, the settlement also avoided trial of McDermott's Shearleg crane damages and provided the only recovery McDermott would receive for that entire class of damages, since the sling defendants turned out to be the only parties chargeable with such damages.

The *pro tanto* conversion of settlements from the plaintiff's benefit to a non-settling defendant's wholly destroys the consideration for the above-described settlement bargain. Plaintiffs' counsel, knowing they can gain nothing more than the judgment by settling, could not advise their clients to proceed other than to trial against all potential defendants, on all potential claims. This is particularly true where, as in the present case, the non-settling defendants continue to deny liability by pointing to others, i.e., the settling defendants. It is either disingenuous or naive to suggest, as some proponents of the *pro tanto* credit for settlement rule have, that plaintiffs or courts are somehow relieved of concern for the third party liability defense or that defendants will not use this diversionary strategy to minimize their liability, if a dollar for dollar credit for settlement is given.[20]

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[20] "The extent of wrong doing of the settling defendants in relation to the [non-settling defendants] is either highly relevant (under the 'proportionate' rule) . . . or not important at all (under the '*pro tanto*' rule)." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 161 (4th Cir. 1991); discussed in D. Hansen, "The Effect of Partial Settlements on the Rights of Non-Settling Defendants in Federal Securities Class Actions: In Search of a Standardized Uniform Contribution Bar Rule," 60 U.M.K.C.L.Rev. 91, 107 (1991).

> "Under either [proportionate or *pro tanto*] rule, the non-settling defendants have every incentive to minimize their liability by arguing at trial that the settling defendants were at fault."

In re Sunrise Sec. Litig., 698 F.Supp. 1256, 1260 (E.D.Pa. 1988). So long as defendants retain the right to urge the defense of third party liability at trial, dollar for dollar credit for an already discounted settlement will always tend to compound the reduction in plaintiff's recovery.

B. *PRO TANTO* SETTLEMENT CREDIT DISCOURAGES GOOD FAITH SETTLEMENT

Plaintiffs subjected to the *pro tanto* scheme, as noted above, lose the economic incentive to settle, because they do not get to keep the money after trial and they know they will still have the same defenses to overcome in order to obtain a judgment. Defendants, particularly the most culpable ones, have little motivation to settle, either. The most culpable defendants gain the most by putting as much pressure on their co-defendants to settle for as much as possible with the plaintiff. This is true, because minimally liable defendants would contribute little by proportionate apportionment anyway, while the mostly culpable defendant already expects to bear the brunt of

plaintiff's recovery; thus, intransigence by the worst defendants is favored by the *pro tanto* credit. The alternative for the mostly liable defendant is to try to conceal its liability and settle quickly and cheaply, before discovery is complete, thus passing its liability on to any minimally liable, solvent party. Proponents of the *pro tanto* approach have suggested that defendants who genuinely believe themselves to be free from liability are most likely to go to trial and most deserving of their day in court. Yet, as noted above, the *pro tanto* regime provides every incentive for the opposite result. *Holding the Bag – Proportional Fault and the Non-Settling Defendant: Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1988 A.M.C. 2278 (11th Cir. 1987), cert. denied, 108 S.Ct. 2017, 1988 A.M.C. 2407 (1988)*, 14 Tul.Mar.L.J. 415, 422 (1990).

Pro tanto credit for settlement also discourages settlement by removing the incentive of minimizing or curtailing litigation. Equity, deterrence and *Reliable Transfer* require that responsibility for damages be spread by proportionate liability. Accord, *Great Lakes Dredge & Dry Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir. 1992). Either substantial litigation must be undertaken to assess the "good faith" or fairness of the settlement amount for the non-settling defendants so that a "contribution bar" can be ordered or contribution rights must be kept open and litigated.

The litigation history of *Great Lakes Dredge & Dry Dock Co. v. Tanker Robert Watt Miller, id.* exemplifies why virtually every court that has applied a "*pro tanto* credit for settlement" rule has undertaken the necessary determination of the settlement's fairness and good faith as foundation for a "settlement bar" to contribution. The

collision in that case occurred February 5, 1975. Chevron settled all ten of the personal injury and death claims against it by May 29, 1979. Trial of the plaintiffs' cases against *Great Lakes* began June 1, 1979. Chevron was found 100% at fault and *Great Lakes* was exonerated. The seamen plaintiffs appealed, obtaining reversal and remand. *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982). The case was tried again, January 28, 1985, resulting in a finding of 70% liability against Chevron, 30% against *Great Lakes*.[21] All three parties appealed, *inter alia*, the trial court's proportionate reduction of Self's recovery by Chevron's *pro rata* share of liability. In *Self v. Great Lakes Dredge & Dock Co., supra*, the court affirmed in part, reversed in part and remanded for a new trial on damages and for application of a *pro tanto* credit and joint and several liability between Chevron and Great Lakes. Great Lakes settled before trial with Self and urged claims for contribution which the trial court denied. On April 16, 1992, the Eleventh Circuit again reversed and remanded for trial of Great Lakes contribution claims. *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir. 1992), *cert. denied* 113 S.Ct. 484 (1993). Eighteen years post-accident, fourteen years after the first trial, and three appeals later, the case is still not resolved.[22]

Since the Fifth Circuit gave no consideration to any "fairness" evaluation of the settlement in the present

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[21] *Great Lakes* had, by this time, settled all the seaman's claims except those for the death of Danny Self.

[22] Punitive damage claims urged and settled against *Great Lakes*, among other issues, provide the complex fodder for more litigation.

case, nor in any of its other *Self/Hernandez*-based decisions, it can only be presumed that it is headed down the same Hobbesian "slippery slope" to confusing and protracted litigation that the Eleventh Circuit plunged down in the *Great Lakes Dredge* litigation. Balanced against such anarchy, the "fairness" or "good faith" hearings required for application of a contribution bar under regimes following the Uniform Contribution Among Tortfeasors Act § 1, 12 U.L.A. 63 (1975)[23] seems a great improvement. However, a thorough evaluation of the "fairness" hearing process shows that it, too, is merely an awkward, problematic, and unnecessary appendage to the maritime law of comparative liability.

The mere listing of factors considered by courts in evaluating the fairness of settlements demonstrates the inefficiency and cost attendant to the *pro tanto* credit for settlement rule:

1. The lack of collusion;
2. Relation of settlement amount to potential success on liability and damages at trial;
3. Defendants' ability to pay;
4. The amount and nature of discovery and evidence;
5. The stage of the proceedings;
6. Potential expense and duration of litigation;

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[23] "The requirement that the release or covenant be given in good faith gives the court occasion to determine whether the transaction was collusive, and if so there is no discharge." Uniform Contribution Among Tortfeasors Act § 4, 12 U.L.A. 98, 99 (1975) (commissioners' comment).

7. Recommendations of experienced counsel;
8. Plaintiff's need for immediate relief; and
9. The number and nature of objections.

Kirkorian v. Borelli, 695 F.Supp. 446, 450 (N.D. Cal. 1988). When "good faith" is also evaluated, in addition to the foregoing, courts consider (1) the possible uncollectibility of a larger judgment against settling defendants; (2) the adequacy of settlement in light of uncertainties surrounding the settling defendants' liability; (3) adequacy of the settlement amount in light of comparative culpability of the defendants; and (4) participation of a magistrate or judge in settlement negotiations. *Id.* at 453. Still more factors have been identified for evaluation of a settlement's propriety. These include (1) the extent of documentary evidence in the case (since early settlement would precede deposition and trial testimony), (2) the fact finder's likely grasp of liability and damage theories and evidence, (3) the experience and personality of the judge, (4) the skill and experience of opposing counsel. D. Gold, *Partial Settlements in Securities Actions with Private Parties and the Securities and Exchange Commission*, 443 Practising Law Institute, Litigation and Administration Practice Course Handbook Series 695 (September-October 1992). The parties and court might as well try the entire case. The most notable and probable limitation on these fairness hearings is the parties' unwillingness to disclose strengths, weaknesses, and strategies of their cases in full view of non-settling defendants. The obvious result is that the "fairness" or "good faith" hearing is conducted with such reticence that it is useless, or the intransigent defendant is provided not only dollar for dollar contribution from settling parties, regardless of liability, but also a

preview (with each settlement) of the plaintiff's case, so that it can further minimize its exposure – all this, and the case is still to be tried.

Both "fairness hearings" and open contribution involve substantial litigation and cost ancillary to the main case, yet there is no reason to believe either can produce better results than the settling parties' consideration of their own strengths and weaknesses in reaching reasonable settlements, enforced by one trial of the matter that apportions comparative liability once and for all.[24]

III. THE PROPORTIONATE, MODERN *PRO RATA*, EQUITABLE CREDIT OR *LEGER* APPROACH – BY ANY OTHER NAME WOULD SMELL AS SWEET

A. THERE IS NO CONFLICT WITH *EDMONDS*

Self's rejection of *Leger* appears based upon a misperception that *Leger* abrogated joint and several liability among co-tortfeasors. Nothing in *Leger* requires such a result. *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421 (5th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, Nos. 1911251 and

[24] This is also true *vis a vis* the "one satisfaction rule." As the Pennsylvania Supreme Court reasoned in adopting a proportionate regime, " . . . 'there [is no] reason to suppose that the jury's evaluation of losses is more accurate than the evaluation made by the parties to the settlement. Surely where liability is contested, the verdict many not reflect the exact worth of the injuries.' " *Charles v. Giant Eagle Markets*, 513 Pa. 474, 478-79, 522 A.2d 1, 3 (1987), quoting *Theobald v. Angelos*, 44 N.J. 228, 239-40, 208 A.2d 129, 135 (1965).

1911252, slip opinion p. 10, 61 U.S.L.W 2745, 1993 W.L. 154448 (Ala. May 14, 1993). The non-settling tortfeasors remain jointly liable for the proportionate share of plaintiff's damage, not released by settlement with other defendants. As discussed above, *Edmonds'* statutorily immunized stevedore is otherwise simply not comparable to a defendant whose proportionate share of liability is voluntarily released by settlement.

B. PROPORTIONATE CREDIT FOR SETTLEMENT IS EFFICIENT, EFFECTIVE, AND FAIR

The *Leger* proportionate liability rule is most efficient because it resolves the entire case in one trial as *Reliable Transfer* suggested. T. Schoenbaum, *Admiralty and Maritime Law*, 1992 Supplement, § 4-15, p. 26 (West 1987). There is no need for contribution litigation, unless non-settling parties do not pay their apportioned shares. The amount of a contribution debtor's liability has already been conclusively determined; all that remains is for co-defendant creditors to execute thereon. The separate "fairness trial" required under a *pro tanto* credit rule that bars contribution is rendered superfluous.

Since all liabilities are to be apportioned in one trial, including the liability of settling parties, all have the same motivation to carefully assess their potential rights and liabilities and to approximate them in settlement. Collusion or irresponsibly low settlements should be well dissuaded by the knowledge that non-settling defendants will nonetheless only pay their proportionate share of liability in damages. Plaintiff stands to gain nothing by collusion with a settling defendant beyond what good

trial preparation would provide. If a plaintiff is willing to trade off settlement dollars against his own litigation expenses, e.g., by obtaining a settling defendants' cooperation in producing witnesses, he should have the benefit and risk of that tactic.[25] Informing the jury of the fact of the settlement, as McDermott candidly did in the present matter, prevents the possibility of any prejudice from jury speculation about the absent defendant.

Most notably, the *Leger* rule is fair. Liability is equitably distributed among the parties in proportion to their fault and causation of damages. More culpable tortfeasors bear greater liability and less blameworthy ones bear less, regardless of the settling parties' bargains. Thus, the rule of *Reliable Transfer* and its underlying policy – deterrence of unsafe behaviors by placement of liability upon the parties responsible for accidents in accord with their comparative contribution – is furthered.

> "One of the principle virtues of the 'proportionate' method lies in its promotion of the policy objectives served by the contribution right which it replaces: *fairness* (by apportioning liability according to fault), and *deterrence* (by insuring that the most culpable parties bear the consequences of their actions). It is the only set off, as the Ninth Circuit recognized, which satisfies 'the statutory goal of punishing each wrongdoer, the equitable goal of limiting liability to relative culpability, and the policy goal of

[25] Fed.R.Evid. 403 permits the opposing parties' revelation of the settlement in cross examination of witnesses affiliated with settling parties if it is germane to interest or bias.

> encouraging settlement.' *Franklin v. Kay Pro Corp.*, 844 F.2d at 1231."

U.S.F. & G. v. Patriot's Point Development Authority, 772 F.Supp. 1565, 1573 (D.S.C. 1991). At the same time, and with no diminution in deterrence, the " . . . aleatory nature of the settlement process . . . " is respected[26] and plaintiff receives but one satisfaction, either agreed in settlement or adjudged at trial, for each defendant's proportionate share of liability. As one learned commentator recently noted:

> "On balance, about all one gets from *Self* [*pro tanto* settlement set-off] with a settlement bar to contribution is certainty. The Supreme Court held in *Reliable Transfer* that certainty which was unfair could no longer be approved in maritime law."

W. Daly, *Contribution and Indemnity*, paper delivered at the Tulane University School of Law Admiralty Law Institute, March 17-19, 1993 (to be published in the Tulane Maritime Law Journal).

CONCLUSION

The injustice of the Fifth Circuit's credit to trial defendants of the settling defendants' *pro rata* share of liability *and pro tanto* credit for the settlement amount is clear. The questions presented for decision in this case by the parties, *amici curiae*, and the conflicting rules of the

[26] *Doyle v. United States*, 441 F.Supp. 701, 711 n.5 (D.S.C. 1977).

lower courts are whether and from whom a non-settling defendant can obtain some sort of credit for other defendants' settlements with plaintiffs, while still honoring the plaintiffs' release of settling defendants from liability for contribution. McDermott, as petitioner herein, submits that there is no legal basis nor is there any need to grant trial defendants dollar for dollar credit for a settlement to which they are not a party. Settlements are and should be extra-judicial, contractual resolutions of disputes. If a trial defendant or plaintiff wishes, for any reason, to have his liability affected by liability attributable to settling parties, he must undertake a trial strategy to present such a case to the fact finder; and any opposing parties must make their cases accordingly. This regime already obtains as the ubiquitous "third party liability" defense shows. It requires no ancillary litigation over the settlement, while economically coercing parties to make genuine good faith efforts to settle for amounts commensurate with potential liability. Litigation costs are, thereby, no more than what is required to try the matter between the parties who cannot settle. All the attendant costs, burdens, risks, and benefits rest with the parties to each decision, counselling fairness and responsibility at every stage of litigation.

Wherefore, McDermott, Inc. prays that this Honorable Court reverse the decision of the United States Court of Appeals for the Fifth Circuit, herein, and reinstate the judgment of the trial court, denying the non-settling hook

defendants dollar for dollar credit for the sling defendants' settlement.

Respectfully submitted,

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